toral college is a direct consequence of how the framers of the Constitution chose to structure our government—a choice itself based on political compromise rather than conceptual perfection." *Id.* at 4a. Thus, vesting the franchise in States rather than citizens "cannot be 'unconstitutional' because it is what the Constitution itself provides." *Ibid.* Noting that petitioners' constitutional claim had been rejected three times by the court of appeals, the court stated: "In this en banc decision, we now put this constitutional claim fully at rest: it not only is unsupported by the Constitution but is contrary to its provisions." *Id.* at 5a.

The en banc court of appeals also held that petitioners' reliance upon three international instruments - the ICCPR, the Universal Declaration of Human Rights, and the Inter-American Democratic Charter—did not warrant relief. The court observed that "[n]o treaty claim, even if entertained, would permit a court to order the electoral college to be enlarged or reapportioned," since "neither a statute nor a treaty can override the Constitution." Pet. App. 5a-6a.

The court of appeals also rejected petitioners' efforts to recast the claim as one seeking declaratory (rather than injunctive) relief, identifying "a host of problems with the treaty claim, including personal standing, redressability, the existence of a cause of action, and the merits of the treaty interpretations offered." Pet. App. 6a. The court found it "unnecessary to plumb these questions, * * * because none of these treaties comprises domestic law of the United States and so their *status* furnishes the clearest ground for denying declaratory relief." *Id.* at 7a. The court held that the international instruments cited by petitioners "do not adopt any legal obligations binding as a matter of domestic law,"

noting that the Universal Declaration and the Inter-American Democratic Charter are merely "precatory," and the ICCPR is not self-executing. *Id.* at 8a-9a. To declare that the United States was in violation of these provisions "would attempt to do what the President and Congress have declined to do, namely, to deploy the treaty provision in an attempt to order domestic arrangements within the United States." *Id.* at 9a.

Finally, the court of appeals rejected the contention that "customary international law" requires a declaration concerning the right of Puerto Rico residents to vote in presidential elections. Noting the different methods by which democratic nations choose their leaders, the court concluded: "If there exists an international norm of democratic government, it is at a level of generality so high as to be unsuitable for importation into domestic law." Pet. App. 11a.

b. Judge Lipez concurred in the judgment. Pet. App. 13a-22a. The concurring opinion would not have reached the merits of petitioners' claim for declaratory relief, concluding that the court lacked jurisdiction over the claim because it is not redressable by the court. *Id.* at 13a-14a. The concurring opinion explained that "there is only hope and speculation that Congress, in response to a declaratory judgment about a violation of international law, would invoke cumbersome and contentious processes relating to Constitutional amendment or the admission of a new state to eventually give citizen residents of Puerto Rico the right to vote for President and Vice President. Such hope and speculation does not satisfy the 'case or controversy' requirement of Article III." *Id.* at 22a.

c. Judge Campbell issued a short concurring opinion (Pet. App. 12a) agreeing with the concurrence of Judge

Lipez that the court lacked jurisdiction to grant declaratory relief. He also agreed with the majority's "alternative analysis which leads to the same outcome." *Ibid.*

d. Judge Torruella dissented. Pet. App. 23a-66a. In a lengthy opinion recounting the political and legal history of Puerto Rico, Judge Torruella asserted that the right to vote is fundamental and that, even if international legal instruments are not self-executing and do not create private rights, the court should enter a declaratory judgment stating that the United States has not taken any steps to comply with those international instruments. See *id.* at 25a-66a.

e. Judge Howard also dissented. Pet. App. 66a-81a. He asserted that the case should be remanded to permit the parties to develop a record concerning whether the ICCPR is self-executing. *Id.* at 80a-81a.

ARGUMENT

The court of appeals held that the Constitution does not confer upon U.S. citizens residing in Puerto Rico the right to participate in presidential elections and that the courts lack the authority to enter a declaratory judgment stating that the United States has violated various international instruments in failing to provide for such a right. That decision is amply supported by constitutional text, unbroken tradition, and uniform precedent. Moreover, the court of appeals' decision does not create a conflict in the circuits. Accordingly, review by this Court is unwarranted.

1. a. The Constitution expressly provides for the President to be elected through a vote of presidential electors chosen by the States. In pertinent part, Article II states: "Each *State* shall appoint, in such Manner as the Legislature thereof may direct, a Number of Elec-

tors, equal to the whole Number of Senators and Representatives to which the *State* may be entitled in the Congress." Art. II, § 1, Cl. 2 (emphases added). Moreover, the Twelfth Amendment provides for the electors to vote for President "in their respective *states*" and further provides that, if no candidate receives a majority of votes of the presidential electors, the House of Representatives is to elect the President in a vote "taken by *states*, the representation from each *state* having one vote" (emphases added). These provisions make unambiguously clear that only the States (and, derivatively, the citizens of States) may participate in presidential elections.

The Twenty-third Amendment reinforces this understanding. That Amendment permits the District of Columbia to appoint presidential electors, and it specifies that the number of such electors shall be "equal to the whole number of Senators and Representatives in Congress to which the District would be entitled *if it were a State*, but in no event more than the least populous State" (emphasis added). The Amendment obviously presupposes that, because the District of Columbia is not a State, it could not have participated in the presidential election absent a constitutional amendment.

The Constitution also expressly distinguishes between States and territories, the latter of which are nowhere mentioned in the clauses addressing presidential elections, but which are addressed in a separate clause providing that "[t]he Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other property belonging to the United States." Art. IV, § 3, Cl. 2. Moreover, when the Twelfth Amendment was ratified in 1804, United States "Territory" (outside of any State) included the

Indiana Territory, the Mississippi Territory, and the Louisiana Territory. Nonetheless, the Amendment confirmed that only States would appoint presidential electors, after Congress specifically rejected an alternative amendment that would have provided for the presidential electors to be chosen by a nationwide popular vote. See *McPherson* v. *Blacker*, 146 U.S. 1, 33-34 (1892).

The understanding that States, but not territories, would participate in presidential elections has remained uniform throughout American history. To pick but a few examples: the Indiana Territory and the Louisiana Territory did not participate in presidential elections either before or after ratification of the Twelfth Amendment; Alaska and Hawaii did not participate in presidential elections before achieving statehood in 1959; the District of Columbia did not participate in presidential elections before ratification of the Twenty-third Amendment in 1961; and territories within the meaning of the Constitution, such as Puerto Rico (see *Harris* v. *Rosario*, 446 U.S. 651 (1980)), Guam, and the Virgin Islands, to this day do not participate in presidential elections. This Court has held that "'traditional ways of conducting government * * * give meaning' to the Constitution," *Mistretta* v. *United States*, 488 U.S. 361, 401 (1989) (citation omitted), particularly where the practice at issue has spanned the entirety of American history. See, *e.g.*, *Marsh* v. *Chambers*, 463 U.S. 783, 792 (1983); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 328 (1936). That principle clearly applies here, where no territory has ever participated in any of the 54 presiden-

tial elections conducted over more than two centuries of American history.[1]

b. Petitioner's fundamental premise—that the right to vote in presidential elections accrues as a right of United States citizenship (Pet. 11)—is incorrect. In fact, this Court has recognized that the right to appoint presidential electors is constitutionally vested in the States. See, *e.g.*, *Bush* v. *Gore*, 531 U.S. 98, 104 (2000) (per curiam) ("The individual citizen has no federal constitutional right to vote for electors for President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college."); *Anderson* v. *Celebrezze*, 460 U.S. 780, 794 n.18 (1983) ("The Constitution expressly delegates authority to the States to regulate the selection of Presidential electors."); *McPherson*, 146 U.S. at 35 ("the appointment and mode of appointment of electors belong exclusively to the States under the Constitution"); *In re Green*, 134

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[1] Petitioner argues (Pet. 10) that Ohio has participated in presidential elections since 1803 even though it was "not formally admitted as a state until 1953" due to a technical error. However, the courts have uniformly rejected the contention that Ohio was not properly admitted as a State in 1803. See, *e.g.*, *Knoblauch* v. *Commissioner*, 749 F.2d 200, 201-202 (5th Cir. 1984) (collecting cases), cert. denied, 474 U.S. 830 (1985); *State* v. *Bob Manashian Painting*, 782 N.E.2d 701, 704 (Ohio Mun. Ct. 2002) ("Litigants in other courts have argued that Ohio is not a state, or that it was never properly admitted to the Union. These assertions are entirely groundless.") (collecting cases); see also *Bowman* v. *Government of the U.S.*, 920 F. Supp. 623, 625 n.4 (E.D. Pa. 1995) (concluding that the 1953 presidential declaration of Ohio's statehood was "purely ceremonial"). This Court recognized long ago that Ohio was "admitted to the Union in 1802, under an act of Congress." *Van Brocklin* v. *Tennessee*, 117 U.S. 151, 160 (1886); see also *Piqua Branch of the State Bank* v. *Knoop*, 57 U.S. (16 How.) 369, 384 (1854) (discussing Ohio Enabling Act).

U.S. 377, 379 (1890) (referring to "the vote of the State for President and Vice-President of the nation"); see also *Romeu* v. *Cohen*, 265 F.3d 118, 123 (2d Cir. 2001) ("the Constitution does not directly confer on any citizens the right to vote in a presidential election."); *In re Opinion of the Justices*, 107 A. 705, 706 (Me. 1919) ("The language of section 1, subd. 2, is clear and unambiguous. It admits of no doubt as to where the constitutional power of appointment is vested, namely, in the several states.").

Petitioners nevertheless contend (Pet. 10) that the specific constitutional provisions governing presidential elections must be considered in conjunction with other constitutional provisions governing voting rights, such as the First, Fourteenth, and Fifteenth Amendments. But whatever the source and scope of the right to vote in other contexts, there is simply no individual constitutional right to vote for President of the United States. For instance, this Court made clear in *Bush* v. *Gore* that equal protection constraints attach only *after* a "state legislature vests the right to vote for President in its people," and the Court stressed that "[t]he State, of course, after granting the franchise in the special context of Article II, can take back the power to appoint electors." 531 U.S. at 104. In *McPherson*, the Court noted that "[t]he constitution does not provide that the appointment of electors shall be by popular vote" (146 U.S. at 27), and it specifically rejected a contention that a popular vote for the President is required by the Fourteenth and Fifteenth Amendments, including the Equal Protection Clause (see *id.* at 38-40).

Nor do due process or equal protection principles, including the principle of "one person, one vote" recognized in *Reynolds* v. *Sims*, 377 U.S. 533 (1964), under-

mine the electoral college that provisions of the Constitution itself specifically mandate for presidential elections. In *Gray* v. *Sanders*, 372 U.S. 368 (1963), for example, the Court explained that the electoral college, "despite its inherent numerical inequality," was "validated" by its specific inclusion in the Constitution. *Id.* at 378; see *id.* at 380 ("The only weighting of votes sanctioned by the Constitution concerns matters of representation, such as the allocation of Senators irrespective of population and the use of the electoral college in the choice of a President."). Similarly, in *Reynolds*, this Court invalidated state apportionment plans inconsistent with the "one person, one vote" principle, but nonetheless stressed that the Senate apportionment scheme (which, like the electoral college, does not follow the "one person, one vote" principle) is "one ingrained in our Constitution, as part of the law of the land." 377 U.S. at 574.

c. The court of appeals decision is consistent with every court that has addressed the issue of the right of constitutional territories (and derivatively their citizens) to participate in presidential elections. In *Attorney General* v. *United States*, 738 F.2d 1017, 1019 (1984), cert. denied, 469 U.S. 1209 (1985), the Ninth Circuit rejected a suit seeking presidential voting rights brought on behalf of U.S. citizens residing in Guam. That court explained that "[t]he right to vote in presidential elections under Article II inheres not in citizens but in states; citizens vote indirectly for the President by voting for state electors." The court concluded: "Since Guam concededly is not a state, it can have no electors, and plaintiffs cannot exercise individual votes in a presidential election. There is no constitutional violation."). Accord *Sanchez* v. *United States*, 376 F. Supp. 239, 242

(D.P.R. 1974) ("until the Commonwealth [of Puerto Rico] votes for Statehood, or until a constitutional amendment is approved which extends the presidential and vice presidential vote to Puerto Rico, there is no substantial constitutional question raised").

2. The court of appeals also correctly rejected petitioners' contention that various international instruments support their request for judicial intervention to permit citizens residing in Puerto Rico to participate in presidential elections.

a. First, none of the international instruments invoked by the petitioners creates legal rights or obligations enforceable through the courts. Two of the instruments—the Universal Declaration and the Inter-American Democratic Charter—are aspirational resolutions that are not binding by their terms and therefore cannot create legal rights or obligations.

With respect to the Universal Declaration, Eleanor Roosevelt, Chairman of the United Nations Commission on Human Rights when the Declaration was drafted, spoke for the United States and stated that the Declaration "was not a treaty or international agreement and did not impose legal obligations; it was rather a statement of principles." See John P. Humphrey, *The UN Charter and the Universal Declaration of Human Rights*, *in The International Protection of Human Rights* 39, 50 (Evan Luard ed. 1967). Accordingly, the Universal Declaration "does not of its own force impose obligations as a matter of international law." *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 734 (2004); see also *Flores* v. *Southern Peru Copper Corp.*, 414 F.3d 233, 261 n.38 (2d Cir. 2003) (Universal Declaration is "merely a non-binding resolution") (citation omitted).

The Inter-American Democratic Charter, adopted in 2001 by the General Assembly of the Organization of American States (OAS), likewise is merely a non-binding aspirational instrument. Immediately prior to the Charter's adoption, the U.S. Ambassador to the OAS made that point clear, stating to the OAS that "the United States understands that this Charter does not establish any new rights or obligations under either domestic or international law." Remarks of Ambassador Roger Noriega, OAS Permanent Council Meeting (Sept. 6, 2001), excerpted in Representation: Inter-American Democratic Charter, *2001 Digest* chap. 6(I)(1), at 347. Moreover, the Charter speaks in "broad generalities" and in that way confirms that its provisions "are declarations of principles, not a code of legal rights." *Frolova* v. *Union of Soviet Socialist Republics*, 761 F.2d 370, 374 (7th Cir. 1985). And the Charter itself gives no indication that it is to be enforced by courts, but instead provides for an international diplomatic mechanism to address non-observance of its provisions. See Inter-American Democratic Charter, arts. 17-22.

The ICCPR, while a binding international agreement, is not self-executing and, as the Executive stated when submitting it to the Senate for ratification, its substantive provisions "would not of themselves become effective as domestic law." S. Exec. Docs. Nos. C, D, E, and F, 95th Cong., 2d Sess., at vi (1978); see also *Whitney* v. *Robertson*, 124 U.S. 190 (1888); *Buell* v. *Mitchell*, 274 F.3d 337, 372 (6th Cir. 2001); Restatement (Third) of the Foreign Relations Law of the United States § 111 cmt. h (1987). As "a compact between independent nations," the ICCPR "depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it," and any infraction be-

comes "the subject of international negotiations and reclamations." *Head Money Cases*, 112 U.S. 580, 598 (1884). Thus, "[i]t is obvious that with all this the judicial courts have nothing to do and can give no redress." *Ibid.*

Moreover, the Senate expressly stated in its resolution of ratification that "the United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing." 138 Cong. Rec. 8071 (1992). Thus, controlling authority from this Court, *Sosa*, 542 U.S. at 734-735, establishes that the ICCPR is not self-executing and does not create obligations enforceable in the courts. The Senate expressly conditioned its ratification of the ICCPR on the proviso that "[n]othing in this Covenant requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States of America as interpreted by the United States." 138 Cong. Rec. at 8071. An interpretation of the ICCPR to require a change in the constitutional framework for the selection of the President and Vice President would be directly contrary to that understanding.

b. In any event, the international instruments relied on by petitioners would provide no basis for relief in this case, because *no* international instrument can alter the system set forth in the Constitution for selecting the President and Vice President. This Court "has regularly and uniformly recognized the supremacy of the Constitution over a treaty." *Reid* v. *Covert*, 354 U.S. 1, 17 (1957) (plurality opinion); see *In re Burt*, 737 F.2d 1477, 1484 (7th Cir. 1984) (collecting cases). Indeed, it is "obvious" that "no agreement with a foreign nation can confer power on the Congress, or on any other

branch of Government, which is free from the restraints of the Constitution." *Reid*, 354 U.S. at 16.

This principle applies even though the Supremacy Clause provides that treaties shall be the "Law of the Land." As the *Reid* Court held, there is "nothing in this language which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution." 354 U.S. at 16. Statutes also are the "Law of the Land," but like treaties, must yield to the Constitution. And because a statute can override or abrogate a treaty, "[i]t would be completely anomalous to say that a treaty need not comply with the Constitution when such an agreement can be overridden by a statute that must conform to that instrument." *Id.* at 18.[2]

c. Finally, even apart from questions of constitutional supremacy and judicial enforceability, adherence to the electoral college system is not inconsistent with any of the three international instruments at issue. Each of those instruments speaks generally concerning the right to vote in periodic elections and to take part in the governance of one's country. Those rights are exer-

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[2] This Court's decision in *Roper* v. *Simmons*, 125 S. Ct. 1183 (2005), does nothing to undermine this longstanding principle. In that case, the Court looked to international understanding to *confirm* its holding that imposition of the death penalty for offenders under the age of 18 at the time of the offense is inconsistent with evolving standards of decency and therefore violates the Eighth Amendment. See *id.* at 1198-99; see also *id.* at 1200 (acknowledging that the opinion of the world community is "not controlling our outcome"). Unlike questions of cruel and unusual punishment under the Eighth Amendment, the validity of the constitutional framework establishing the electoral college is not subject to a standard that focuses on "evolving standards of decency." Thus, nothing in *Roper* permits resort to international instruments to override the clear commands of Article II.

cised by the citizens of Puerto Rico within the context of a vibrant democratic political system. Federal law establishes Puerto Rico as a Commonwealth with rights of self-government and guarantees its citizens numerous statutory and constitutional rights. See, *e.g.*, 48 U.S.C. 731d, 734, 737; 8 U.S.C. 1402; *Rodriguez* v. *Popular Democratic Party*, 457 U.S. 1, 7-8 (1982); *Trailer Marine Transport Corp.* v. *Rivera Vazquez*, 977 F.2d 1 (1st Cir. 1992); *Lopez* v. *Aran*, 844 F.2d 898, 902 (1st Cir. 1988).[3]

On the important question of Puerto Rico's status in relation to the United States, the citizens of Puerto Rico have not been denied their right to participate. Commonwealth status, as opposed to statehood, has advantages as well as disadvantages. See, *e.g.*, 26 U.S.C. 933 (income of Puerto Rico residents is not subject to federal income tax). With full knowledge of both the benefits and drawbacks of statehood, including the implications of that status on participation in presidential elections, the citizens of Puerto Rico have voted repeatedly—in 1967, 1993, and 1998—against statehood. See José Trías Monge, *Plenary Power and the Principle of Liberty: An Alternative View of the Political Condition of Puerto Rico*, 68 Rev. Jur. U.P.R. 1, 12-13, 17, 19 (1999).

3. The court of appeals also correctly held that the Declaratory Judgment Act does not provide relief here.

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[3] The United Nations has recognized that "the people of the Commonwealth of Puerto Rico have effectively exercised their right to self-determination," and "the people of the Commonwealth of Puerto Rico have been invested with attributes of political sovereignty which clearly identify the status of self-government attained by the Puerto Rican people as that of an autonomous political entity." G.A. Res. 748, U.N. GAOR, 8th Sess., Supp. No. 17, at 26, U.N. Doc. A/2630 (1953).

Because the international instruments at issue provide no individual legal rights, a court cannot enter a declaratory judgment on the question whether United States action is inconsistent with those instruments. Entering such a judgment would be an unwarranted intrusion by the courts into matters of domestic constitutional structure and delicate areas of foreign relations in which they are ill-equipped to operate, and would reflect an incorrect use of the Declaratory Judgment Act to circumvent the lack of both private rights and judicial enforceability.

The Declaratory Judgment Act, 28 U.S.C. 2201, provides that "[i]n a case of actual controversy within its jurisdiction * * * any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." Despite this seemingly broad language, the reach of the Act is limited and was not designed to circumvent a lack of jurisdiction, rights, or a substantive right of action. See *Green* v. *Mansour*, 474 U.S. 64, 73 (1985) (holding that "a declaratory judgment is not available when the result would be a partial 'end run' around" Eleventh Amendment immunity); *Marshall* v. *Crotty*, 185 F.2d 622, 628 (1st Cir. 1950) (holding that, where a former government employee did not have a right to reinstatement by way of mandamus, the court "is likewise without jurisdiction to give a declaratory judgment determining the reinstatement rights"). Where a party seeking declaratory relief has no underlying substantive right of action, a declaratory judgment not only serves as an inappropriate "end run," but also results in a judgment that is "futile and ineffective." *Id* at 627. As a judgment that under no circumstances

could be backed by a coercive order, it "would serve no purpose whatever in resolving the remaining dispute between the parties, and is unavailable for that reason" as well. *Green*, 474 U.S. at 73 n.2; see *Riva* v. *Massachusetts*, 61 F.3d 1003, 1010 (1st Cir. 1995).

Indeed, a naked declaration concerning the United States' observance of otherwise judicially unenforceable international instruments would not "clarify[] and settle[] the legal relations in issue," nor would it "terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." Edwin Borchard, *Declaratory Judgments* 299 (2d ed. 1941). Such a declaration would serve only to embroil the Court in an ongoing political debate by offering the panel's opinion in areas of constitutional structure that are committed to the statehood or amendment process and matters of foreign policy within the responsibility of the political Branches. The court of appeals therefore correctly held that declaratory relief is inappropriate.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 05-650

In the
Supreme Court of the United States

IGARTUA DE LA ROSA, et al.,
Appellants,
v.
UNITED STATES OF AMERICA,
Appellee.

On appeal from the United States District Court for the District of Puerto Rico

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BRIEF OF MICHAEL RICHARDSON AS AMICUS CURIAE IN SUPPORT OF APPELLANTS' PETITION FOR WRIT OF CERTIORARI

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In the
Supreme Court of the United States

No. 05-650

IGARTUA DE LA ROSA, et al.,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANTS' PETITION FOR WRIT OF CERTIORARI

Now comes, Michael Richardson, *pro se*, and moves this Honorable Court for leave to file an *amicus curiae* brief in support of Appellants' Petition for Writ of Certiorari and states as follows:

1) That Movant has secured the written consent of Appellants to file a brief.

2) That Movant has not secured the written consent of the Solicitor General for Appellee to file a brief.

3) That Movant requested the consent to file a brief from the Solicitor General by first-class mail and facsimile transmission on December 15, 2005.

4) That Movant has not received any written response from the Solicitor General to Movant's request of December15, 2005.

5) That Movant was told by phone on January 19, 2006, by the Solicitor General's case management office, that consent was withheld because Movant is not an attorney authorized to practice before the Supreme Court; and, that Movant has no interest in the case.

6) That Movant is acting in his own behalf and represents no person other than himself.

7) That judicial notice has been taken of Movant's brief-writing skills by a state appellate court in *Richardson v. Grundel*, 406 N.E.2d 575 at 578:

> From the record in this case, it seems that Mr. Richardson is, indeed a layman. The addition of the appellation "quasi" by the trial court may well have resulted from the court's marvel at the erudition and skill with which Mr. Richardson researched and briefed his claim. This Court is likewise impressed with the quality of this pro se appellant's brief and argument.

8) That Movant has an interest in the case in that Movant desires to reside in Puerto Rico but does not want to lose or surrender the right to vote for President of the United States.

Wherefore, Movant respectfully prays this Honorable Court to grant leave to file an *amicus curiae* brief in support of Appellant's Petition for Writ of Certiorari.

Dated this 23rd day of January 2006.

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INTEREST OF THE AMICUS CURIAE

The *amicus* is a United States citizen residing in Massachusetts enjoying full rights of suffrage.[1] I desire to move to Puerto Rico but am prevented from moving there because I do not wish to lose my right to vote for President of the United States. Neither Massachusetts state law nor the federal Overseas Citizens Absentee Voting Act, 42 U.S.C.1973ff, will protect or extend my right to vote for President of the United States if I move to Puerto Rico. I respectfully submit this brief *amicus curiae* to invite the Court's attention to the unique circumstances of the case that warrant a review of the merits of the case.

INTRODUCTION

The inferior electoral status of United States citizens residing in Puerto Rico, which has barred them from voting in Presidential elections, was first the subject of litigation in *Sanchez v. United States*, 376 F. Supp. 239 (D. Puerto Rico, 1974). The court opined, "Although citizenship may be a prerequisite to voting, the right to vote is not an essential right of citizenship." *Id.* at 241.

The issue of voting in Presidential elections in Puerto Rico was again litigated in *Igartua de la Rosa v. United State*, 842 F. Supp. 607 (D. Puerto Rico, 1994). The court dismissed the complaint, "for failure to state a claim upon which relief can be granted." *Id.* at 612. Plaintiffs appealed but the lower court decision was summarily affirmed. *Igartua de la Rosa v. United States*, 32 F.3d 8 (1st Cir. 1994) *Cert.* denied, 514 U.S. 1049 (1995).

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states no counsel for a party authored any part of this brief, and no one other than *amicus* has made a monetary contribution to its preparation or submission, or authored any portion thereof. Written consent of the Appellants for this *amicus* brief is on file with the Clerk. The Appellees have not provided written consent. A Motion for Leave to File an *Amicus Curiae* Brief in Support of Appellants is appended.

Again, the issue of voting in Presidential elections by citizens residing in Puerto Rico was brought before the courts in *Igartua de la Rosa v. United States*, 107 F.Supp.2d 140 (D. Puerto Rico, 2000) and 113 F.Supp.2d 228 (D. Puerto Rico, 2000). Plaintiffs prevailed with the court finding, "United States Citizens residing in Puerto Rico have the right to vote in Presidential elections and that its electoral votes must be counted in Congress." 113 F.Supp.2d at 242. Defendant sought review and obtained reversal of the lower court order in *Igartua de la Rosa v. United States*, 229 F.3d 80 (1st Cir. 2000) under a doctrine of *stare decisis*.

Yet again, the issue of voting in Presidential elections by citizens residing in Puerto Rico was once more brought before the courts in *Igartua de la Rosa v. United States*, 331 F.Supp.2d 76 (D. Puerto Rico, 2004) and dismissed, yet again, under the doctrine of *stare decisis*. Plaintiffs sought review but the appellate court affirmed the lower court in *Igartua v. United States*, 386 F.3d 313 (1st Cir. 2004), and then subsequently vacated its decision. An *en banc* court assumed jurisdiction of the appeal from the three-judge panel resulting in the split 5-2 appellate decision, *Igartua de la Rosa v. United States*, 407 F.3d 30, for which review is presently sought by Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

The disenfranchisement of United States citizens residing in Puerto Rico from voting in Presidential elections is not only a severe burden to the residents of the island but is also a burden borne by countless United States citizens who desire to live in Puerto Rico but are unwilling to surrender their right to vote for President of the United States.

Although the unique facts of America's control of the island have confined jurisdiction to the United States First Circuit Court of Appeals, hence removing a possible conflict of appellate decisions, the issues presented fundamentally effect the benefits of

United States citizenship at-large and also implicate the Ninth Amendment unenumerated right to vote.

Further, although the lower courts are free to interpret treaty law, this Court is the only body capable of bringing final resolution to a question posed in the instant case of United States citizens' voting rights arising under formally adopted treaty law.

ARGUMENT

I. THE CONFINEMENT OF VOTING RIGHTS CONTROVERSIES IN PUERTO RICO TO THE FIRST CIRCUIT COURT OF APPEALS ELIMINATES ANY CONFLICT BETWEEN APPELLATE CIRCUITS THUS LIMITING REVIEW

The well established role of the Supreme Court in settling disputes that arise from conflicting decisions between the various United States Circuit Courts of Appeal will never reach the disenfranchisement from voting in Presidential elections of United States citizens residing in Puerto Rico.

The unique history of the island, and its control by the United States of America, has served to confine Puerto Rico's appellate jurisprudence on voting rights issues to the United States First Circuit Court of Appeals. There are no analogous situations; Puerto Rico's relationship to the United States is *sui generis*. Although other disenfranchised United States citizens reside in various territorial possessions outside the First Circuit, their unfortunate circumstances are distinguishable from the plight of citizens residing in Puerto Rico because of the island's own military, legislative, and judicial history.

Puerto Rico was ceded to the United States from Spain by the Treaty of Peace between the United States of America and the Kingdom of Spain [Treaty of Paris], 30 Stat. 1754, on December 10, 1898. Article IX of the Treaty reads: "The civil rights and

political status of the native inhabitants of the territory hereby ceded to the United States shall be determined by Congress." *Id.* at Art. IX, Para 2.

The Foraker Act, 31 Stat. 77 (1900) (codified as amended at 48 U.S.C. in scattered sections), terminated the then military administration of the island and established a non-voting resident commissioner to Congress in 1900.

The Jones Act, 39 Stat. 951 (1917) (codified at 8 U.S.C. 1402), statutorily granted Puerto Rican residents United States citizenship, provided a bill of rights, and established a locally elected House and Senate in 1917.

This Court ruled in *People v. Balzac*, 258 U.S. 298 (1922), that Puerto Rico was an unincorporated territory to which not all provisions of the Constitution are extended. *Balzac*, the capstone of the earlier *Insular Cases*[2], sealed to the present day a judicially recognized legal and political status unique to Puerto Rico. The *Insular Cases* were a series of decisions by this Court in the first years of American control of the island that defined the peculiar and particular relationship of Puerto Rico to the United States.

Appellate Judge Torruella, in his dissent in the instant case, notes the application of the *Insular Cases* to "discrete minorities":

> [T]he Supreme Court, in 1901, decided the *Insular Cases*, wherein it sanctioned Puerto Rico's colonial status *ad perpetuam*. There is no question that the *Insular Cases* are on par with the Court's infamous decision in *Plessy v. Ferguson* in licensing the downgrading of the rights of discrete minorities within the political hegemony of the United States.[3]

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[2] For *Insular Cases* see, *DeLima v. Bidwell*, 182 U.S. 1 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901).

[3] See, *Igartua de la Rosa v. United States*, 407 F.3d 30 (1st. Cir. 2005) citing *Plessy v. Ferguson*, 163 U.S. 537 (1896).